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ABSTRACT

During the past two decades legislatures and courts have reshaped public educational policy. The increasing public awareness of the role of law in all aspects of society and the growing complexity of the educational enterprises have catapulted teachers into litigation to an unprecedented degree. As this trend shows no signs of diminishing in the near future, teachers need to become more informed about the legal facets of their jobs. With the current emphasis on guarding students' and parents' rights, teachers often feel that they are being pressed from all directions and have practically no rights themselves. Legally, this is not true. Although an undergraduate course in school law would offer no immediate panacea, it would furnish a forum for teachers to explore the perimeters of their rights and the legal implications of alternative courses of action open to them. Those charged with preparing future educators need to direct some immediate attention to the long neglected area of undergraduate instruction in school law. (MM)

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School Law: A Growing Concern

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Alexis de Tocqueville has noted that all important social issues in America eventually become judicial issues.[1] This observation is verified in the field of education, as litigation in this arena has increased dramatically in recent years. Before 1850 education was mainly ignored by both federal and state courts.[2] Thus, practices at the local level were left largely unquestioned whether or not they conflicted with the Federal Constitution. From 1850 until 1950 education became firmly established as a state responsibility,[3] and most adjudication during this period took place in state courts. Prior to 1954, slightly more than 100 cases involving education had been initiated in federal courts.[4] However, since 1954 well over 1000 cases concerning education have been litigated at the federal level, with many going all the way to the United States Supreme Court. During the past few decades the federal courts have assumed a more prominent role in ensuring that the individual's constitutional rights are protected and balanced against the interests of the state. This increasing reliance on the federal judiciary is indicative of the growing public dissatisfaction with efforts of legislative bodies to effect reform in public education.

United States Court of Appeals Judge J. Skelly Wright presented the following rationale for the entry of the judiciary into a domain which has traditionally been the sole prerogative of state legislatures:

> It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where Constitutional rights hang in the balance.[5]

Recent School Law Developments:

The impact of the courts in shaping American public education cannot be overemphasized. The concept of "equal educational opportunities" is derived from judicially-created law involving interpretation of the Fourteenth Amendment as it applies to public schools. Justice Earl Warren, delivering the landmark Supreme Court decision in Brown v. Board of Education of Topeka, stressed that "education is perhaps the most important function of state and local governments."[6] He further emphasized that education is required to prepare citizens for most basic public responsibilities as well as for success in a democratic society:

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> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[7]

During recent years few aspects of public schools have remained untouched by judicial and legislative intervention. The egalitarian revolution,[8] coupled with efforts to balance state and individual interests, has generated great controversy by constitutional adjudication in desegregation,[9] separation of church and state,[10] equal educational opportunities,[11] control of pupils,[12] and special education.[13] As citizens become increasingly sophisticated in using powerful legal weapons to effect reform in public schools, educators cannot afford to remain in the background. The following examples portray the prominent role that courts and legislatures have recently assumed in determining educational policy as well as in defining the perimeters of teachers' and students' rights.

In 1968 the Supreme Court handed down a landmark decision that protected teachers' rights to express themselves on matters of public concern. In this case, Pickering v. Board of Education, the teacher had sent a letter to the local newspaper which criticized actions of the school board and superintendent.[14] The board dismissed the teacher, claiming that the letter had disrupted faculty discipline and created conflicts among the professional staff members. However, the Supreme Court rejected this claim and upheld the teacher's right to freedom of expression:

> . . . Absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.[15]

Thus, this decision destroyed the myth that teachers shed their constitutional rights by virtue of becoming public employees.

The judiciary has also changed its posture toward the control of student conduct in public schools. Traditionally, school attendance was thought to be a privilege which could be withheld from students at the discretion of the school board. During the first third of the twentieth century, a female student was suspended for wearing face powder,[16] and a male student was suspended for having metal cleats on his shoes.[17] Courts have made a quantum leap from the stance exhibited in these early cases to the active protection of students' rights espoused in Tinker v. Des Moines: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect."[18] In Tinker the Supreme Court held that the suspension of students who wore armbands to protest the Vietnam War violated their First Amendment right to free expression. The Court further elaborated that students should not be punished for expressing their views unless such expression created a material or substantial disruption to the orderly progress of the school.[19] This declaration has had a tremendous impact on school policies concerning dress codes and censorship of student publications, as well as on disciplinary procedures.

In the Fall of 1975 the Supreme Court finally dealt with the legality of corporal punishment in public education. By upholding a lower court's decision, the Supreme Court sanctioned the use of corporal punishment and reasoned that it did not violate a student's protected constitutional rights.[20] However, the Supreme Court affirmed that other means of punishment should be explored first, and if corporal punishment becomes necessary, minimal procedural due process must accompany it.

The constitutionality of compulsory attendance statutes also has been the topic of a recent Supreme Court decision. Although such laws consistently have been upheld by the courts, even when conflicting with parental interests in freedom of religion,[21] the Supreme Court handed down an exception to this prevailing view in 1972. In State of Wisconsin v. Yoder, the Court held that Amish children were exempted from compulsory attendance requirements after reaching the eighth grade.[22] The Court recognized the state's responsibility for educating its citizens and its power to reasonably regulate and control the length of basic education. Nevertheless, the Court declared that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests."[23] After analyzing the history of the Amish people, the Court concluded that an additional one or two years of formal high school for Amish children would do little to further the state's interests in warding off ignorance and creating an educated citizenry. Conceivably, this Supreme Court decision may motivate other special interest groups to test the legality of compulsory attendance statutes.

Controversy over due process requirements for both teachers and students has resulted in several landmark Supreme Court decisions during the past few years. Prior to the 1970s due process standards for nontenured teachers varied greatly across the nation. Thus, in 1972 the Supreme Court agreed to deliver opinions in two cases involving nontenured teachers who had been dismissed without hearings. In Board of Regents v. Roth the Court held that a nontenured teacher had no constitutional right to due process if the dismissal did not involve impairment of a constitutional right.[24] The mere subjective expectation of reemployment held by Roth was not sufficient to create a protected property interest. However, in a case handed down on the same day as Roth, the Court recognized that a nontenured teacher could have a property right or "de facto tenure" if the actions of the hiring institution had created the expectation that the teacher would be reemployed.[25] Under such circumstances, the teacher would be entitled to notice of the charges and an administrative hearing. The Court also emphasized that process of law would be due if the dismissal impaired the teacher's liberty interests by stigmatizing him.[26] However, it must be noted that the guarantee of due process does not imply that the teacher will automatically retain his position. An administrative hearing only ensures that the teacher will have an opportunity to disprove the charges made against him.

Within the past year two landmark decisions concerning due process rights for students have been handed down by the Supreme Court. In Goss v. Lopez, Justice Byron White, delivering the majority opinion, clearly stated that students have a property right to an education which cannot be impaired without due process of law.[27] Under this Goss mandate, even short term student suspensions must be preceded by an informal hearing to verify that the charges against the student are accurate. In Wood v. Strickland the Court declared that school board members can be personally liable for damages if they intentionally or arbitrarily violate students' constitutional rights.[28] It is

too early to realize the full implications of these two decisions, but the ramifications for educational policy making may be far reaching indeed.

Special education has also been the forum for recent due process litigation. In 1972 a consent agreement in Pennsylvania paved the way for other legal contests which have swept the nation regarding the constitutional rights of handicapped children. In the Pennsylvania agreement the court held that no handicapped child could be denied admission to a public school program or have his educational status changed without procedural safeguards.[29] The court also established that placement of retarded children in a regular class was preferable to a special class, and placement in a special class was preferable to any other type of program. Subsequently, the federal district court in Washington, D.C., held that handicapped children could not be denied an education or reassigned to special classes for longer than two days without due process.[30] Courts have also recognized that labeling children as "special" can create a damaging stigma on the child; thus, arbitrary labeling will be held constitutionally invalid.[31] As often occurs, court decisions regarding the rights of handicapped children have been followed by federal legislation. Public Law 93.380, which will be enforced during the fiscal year of 1976, requires placement of handicapped children in the least restrictive alternative educational setting.[32] It also guarantees due process which makes school officials responsible for proving that their recommendations to place children with unique needs in special classes or settings are justifiable. In view of the federal law, many state legislatures have already passed bills requiring school districts to implement mainstreaming practices for special education students.

Ever since the landmark Brown decision in 1954, school desegregation has been the source of much litigation.[33] Many school systems have been under judicial supervision for years in their efforts to implement desegregation orders. Students in the North and South alike have recently missed portions of their education due to busing boycotts and other racial disturbances. Public hysteria over busing has caused school desegregation to become a focal point with the administrative and legislative branches of government as well as with the judiciary. The final Supreme Court stance as to the breadth of the remedy necessary to eliminate unlawful school segregation could play a dominant role in molding the future of public education in this nation.

A new type of legal contest is starting to emerge which alleges that the child has a right to literacy from his public school experience. A tort action for damages[34] was initiated in the Spring of 1973 against a school district California, charging that a student had traveled through the school system and had been regularly passed from grade to grade, but upon graduation he could not read above the fifth grade level.[35] Although the court eventually declined to offer an opinion in this case, questions surfaced concerning the school's obligation toward the child. Should the school be required to designate certain criteria before a student is progressed, and should standards be set that the student must meet before receiving a diploma? Does the student have the right to procedural safeguards which will protect him from erroneous placements and promotions?

The increasing national interest in exploring the internal operations of schools to guarantee that the rights of children are not arbitrarily impaired also has been reflected in recent congressional legislation which has addressed certain aspects of the school's duty toward the child. The Family Rights and Privacy Act has placed restrictions on school officials' former

power to indiscriminately record data about students.[36] In addition, procedural safeguards are now required before the school can release a student's personal files. Thus, the rationale that a certain practice is "in the best interest of education" can no longer justify educational policies that arbitrarily interfere with the individual's personal liberties.[37] Also, Title IX of the Educational Amendments of 1972 is causing some changes in the organization and administration of public schools.[38] Title IX requires schools to eliminate discriminatory practices based on sex regarding admission policies, employment, and athletics. It is conceivable that federal legislation will continue to become more explicit in establishing standards for school policies, perhaps even in the area of instructional program adequacy.

The above examples lend credence to the contention that judicial decisions, coupled with federal and state legislation, have become powerful forces in shaping the future of public education. Thus, there is little justification for institutions of higher education to graduate aspiring teachers without offering them some formal exposure to legal principles affecting their jobs. Presently teachers can even receive advanced degrees from most institutions, including Indiana University, and never take a course in school law. This posture destines educators to have reform measures thrust upon them by outside forces. Therefore, a crucial need exists to reevaluate teacher preparation programs and ensure that they incorporate the legal issues that have become an integral part of the teacher's role today.

School Law and Teacher Preparation:

The first part of this paper has focused upon recent school law developments in order to stress the need for increased awareness among educators in this arena. Assuming that such a need does exist, it seems logical to evaluate the level of legal knowledge currently possessed by graduating education majors. If evaluation data indicate that there is a void in this domain, appropriate additions and/or revisions in the preservice program should be undertaken. Since it is a popular pastime to criticize what exists (or does not exist), without offering practical suggestions for remedying the situation, the remainder of this paper will be devoted to recommendations for incorporating school law instruction into the teacher preparation program.

Needs Assessment:

Before designing curriculum changes to include exposure to school law principles, baseline data on graduating seniors should be gathered. This information could be obtained most easily by administering a survey instrument to education majors during the semester of their student teaching experience. The instrument should include items to measure students' knowledge of the law, ability to apply legal principles, and attitude toward judicial intervention in the schools. The following items are simply examples of some topics that could be included in such a survey instrument:

> If a first year teacher's contract is not renewed, must the school board give the teacher a hearing? _____ On what authority do you base your answer? _____
>
> Can a teacher be dismissed for writing a letter to the editor of the local newspaper in which he criticizes the school board?
>
> _____

Can a student be suspended for eight days without a due process hearing? _____ What is the landmark Supreme Court case regarding due process for students? _____

_____

The Family Rights and Privacy Act places what restrictions on the activities of a teacher? _____

_____

Does a teacher have the right to search a student's locker if possession of drugs is suspected? _____

What is the Supreme Court's posture toward a teacher's use of corporal punishment? _____

What does *in loco parentis* mean? _____

What is binding arbitration? _____

Do teachers have a legal right to strike? _____

Is a regulation requiring women to quit teaching, when five months pregnant, legal? _____

How many justices are there on the Supreme Court? _____ What members can you name? _____

Title IX of the 1972 Educational Amendments specifies _____

_____

Do you feel that the judiciary should play a more or less active role in the public school domain? _____ Why? _____

_____

What amendment to the U.S. Constitution deals with religious freedom?

_____

What amendment deals with search and seizure? _____

What amendment deals with freedom of speech? _____

What amendment forbids state action that denies citizens equal protection of the laws? _____

Once the survey data are tabulated and analyzed, needs should be ranked on a priority basis. Using this compiled information, revision in the preservice program can then be based on data, rather than on conjecture. Assuming that the survey information coupled with faculty interviews substantiates that there exists a void in the preservice education program regarding school law, the next step would be to evaluate alternative strategies for providing such exposure. Naturally any specific method selected should depend on the identified needs; thus the following approach must be viewed merely as one alternative.

Undergraduate Course:

After reviewing the advantages and disadvantages of several options for incorporating school law into the preservice program, the development of a course, or series of modules that could be used in existing methods courses, may be the most practical manner in which to reach a large number of students. Within the course, specific modules could cover a wide range of substantive legal issues. Also modules could be designed to offer the prospective teacher suggestions for teaching constitutional rights and legal principles to elementary and secondary pupils.

Ideally the modules would comprise a semester course which would become part of the required preservice program for all education majors. However, considering the practicalities of undergraduate course demands, the addition of a new course may not be feasible. Thus, specific modules could be incorporated into the various undergraduate methods courses which are currently being offered. Obviously this approach would require some overall coordination regarding the placement of modules and the materials to be included in each one.

The purpose of undergraduate modules in school law is not to make legal experts of aspiring teachers. Instead, the purpose is to expose education students to concepts of law which influence the daily operation of schools and to familiarize them with the individual's rights in the educational domain. By focusing upon practical school situations which have legal ramifications, hopefully students would be motivated to keep abreast of developments in the school law arena. At the conclusion of such modules, students should be able to demonstrate: an overall understanding of the United States judicial system and the formation of laws relating to public education; an ability to apply principles of law which influence public school teachers; knowledge of landmark school law cases; an understanding of school situations that pose potential for becoming legal issues; and an understanding of how to use available resources to research points of law and analyze relevant cases.

The needs identified by students and faculty members should determine the actual content of the modules designed. Thus, the following module topics are presented solely for purposes of illustration.

Module I: Legal Framework of Education

A. Sources of school law
B. Structure of the courts
C. State control of education
D. Administrative and judicial appeals procedures

Module II: State and Parental Interests in Public Education

A. Compulsory attendance
B. Church-state conflicts
C. Controversial curriculum material in the classroom

Module III: Student Rights and Responsibilities

A. Pupil discipline
B. First amendment guarantees
C. Search and seizure

Module IV: Teachers' Rights

A. Academic freedom
B. Political expression
C. Rights outside the classroom

Module V: Dismissal of Teachers

A. Terms and conditions of employment
B. Due process for tenured and nontenured teachers

Module VI: Tort Liability

A. Governmental immunity
B. Defamation
C. Negligence
D. Liability of teachers, administrators, and board members

Module VII: Teacher Organizations and Negotiations

A. Collective bargaining
B. Teacher strikes

Module VIII: Equal Educational Opportunities

A. Discrimination based on race
B. Discrimination based on sex
C. Discrimination based on wealth
D. Discrimination based on handicaps

Module IX: Teaching Constitutional Rights and Legal Principles

A. Strategies and resources for elementary and secondary students
B. Consumer law, juvenile law, and civil rights
C. Use of peer panel juries

Once major objectives and module topics are agreed upon, the next steps would be to write specific behavioral objectives for the broad categories and to compile a bibliography of books, articles, and cases for each module. Also pre- and post-evaluation instruments should be developed. Obviously, if the modules are used together as a course, each segment would not require a separate bibliography and evaluation forms.

The organizational plan for using the modules would also determine the types of instructional materials and strategies employed. If single modules are incorporated in various methods courses, the use of video tapes and self-instructional materials should be explored as these strategies would reduce the need for expertise on the part of individual faculty members involved in implementation. Some activities, such as simulations, mock trials and grievance hearings, debates of cases, and small group discussions, could be included in either a semester course or individual modules.

Conclusion

During the past two decades legislatures and courts have reshaped public educational policy. The increasing public awareness of the role of law in all aspects of society and the growing complexity of the educational enterprise have catapulted teachers into litigation to an unprecedented degree. As this trend shows no signs of diminishing in the near future, teachers need to become more intelligent about the legal facets of their jobs.

With the current emphasis on guarding students' and parents' rights in the domain of the school, teachers often feel that they are being pressed from all directions and have practically no rights themselves. Legally, this is not true. Although an undergraduate course in school law would offer no immediate panacea, it would furnish a forum for teachers to explore the perimeters of their rights and the legal implications of alternative courses of action open to them. Those charged with preparing future educators need to direct some immediate attention to the long neglected area of undergraduate instruction in school law.

Footnotes

[1]Alexis de Tocqueville, Democracy in America, rev. ed., 1945, p. 280.

[2]See generally John Hogan, The Schools, the Courts, and the Public Interest, 1974, Chapter 2.

[3]See State ex rel. School Dist. No. 29, Flathead County v. Cooney, 102 Mont. 521, 59 P.2d 48 (1936); Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926); City of Louisville v. Commonwealth, 134 Ky. 488, 121 S.W. 411 (1909).

[4]John Hogan, op. cit., p. 7.

[5]Hobson v. Hansen, 269 F. Supp. 401, 519 (1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[6]347 U.S. 483, 493 (1954).

[7]Ibid.

[8]See Phillip Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 University of Chicago Law Review, 1968, p. 583.

[9]See Brown, 347 U.S. 483 (1954); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Milliken v. Bradley, 94 S. Ct. 3112 (1974).

[10]See School Dist. of Abington Township v. Schempp, 347 U.S. 203 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971).

[11]See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[12]See Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975).

[13]See Pennsylvania Association for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

[14]391 U.S. 563 (1968).

[15]Ibid., p. 574.

[16]Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).

[17]Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).

[18]393 U.S. 503, 511 (1969).

[19]Ibid.

[20]Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), aff'd 44 USLW 3237 (Oct. 20, 1975).

[21]See Rice v. Commonwealth, 188 Va. 224, 49 S.E. 2d 342 (1948); State v. Drew, 89 N.H. 54, 192 A 629 (1937).

[22]406 U.S. 205 (1972).

[23]Ibid., p. 214.

[24]Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

[25]Perry v. Sindermann, 408 U.S. 593 (1972).

[26]Ibid., p. 596.

[27]Goss v. Lopez, 419 U.S. 565 (1975).

[28]Wood v. Strickland, 420 U.S. 308 (1975).

[29]Pennsylvania Association for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).

[30]Mills v. Dist. of Columbia Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

[31]See Larry P. v. Riles, 343 F. Supp. 1310 (N.D. Cal. 1972).

[32]For a discussion of this law see Alan Abeson, Nancy Bolick, and Jayne Hass, A Primer on Due Process, the Council for Exceptional Children, 1975.

[33]See Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Milliken v. Bradley, 94 S. Ct. 3112 (1974).

[34]A tort is a civil wrong other than breach of contract, for which the court will provide a remedy in the form of an action for damages.

[35]For a discussion of this case see Gary Saretsky, "The Strangely Significant Case of Peter Doe," Phi Delta Kappan, May, 1973, p. 589; "Suing the Schools for Fraud: Issues and Legal Strategies," Transcript of Conference: Fraud in the Schools, Syracuse Un. Research Corp., ERIC Reports, ED 084 668, March, 1973.

[36]Amendments to General Education Provisions Act, "Family Educational Rights and Privacy Act of 1974," P.L. 93-380, Section 513.

[37]Acquirre v. Tahoka Indep. School Dist., 311 F. Supp. 664, 666 (N.D. Tex. 1970).

[38]P.L. 92-318, Education Amendments of 1972, Title IX.